

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

CHERYL S.,	:	
Plaintiff,	:	CIVIL ACTION
	:	
v.	:	
	:	
COUNTY OF BUCKS, et al.,	:	No. 04-1880
Defendants.	:	

MEMORANDUM AND ORDER

Schiller, J.

July 26, 2004

Plaintiff Cheryl S. brings this action alleging, inter alia, that Defendants Gordian Ehrlacher, Lewis Polk, Joan Crowe, Barbara Schellhorn, Harris Gubernick, and Willis Morton (all of whom are sued in their official and individual capacities),¹ and the County of Bucks (“the County”) violated her rights under the First Amendment to the United States Constitution, the Rehabilitation Act of 1973, and Sections 26 and 28 of Article I of the Pennsylvania Constitution while she was incarcerated at Bucks County Correctional Facility (“BCCF”).² Presently before the Court are Defendants’ motions

¹ According to the Complaint: Ehrlacher is the Director of the Bucks County Department of Health; Crowe and Schellhorn are nurses employed by the Department of Health; Polk is the Medical Director of the Department of Health; Gubernick is the Director of the Bucks County Department of Corrections; and Morton is the Warden of the Bucks County Correctional Facility.

² In a Complaint that may be charitably described as poorly-drafted, Plaintiff’s counsel evinces substantial confusion regarding the nature of her client’s claims. First, Count I is entitled “constitutional claims pursuant to 42 U.S.C. § 1983” (Compl. at Count I), but actually asserts claims unrelated to § 1983. (*Id.* ¶¶ 27-29 (alleging violations of state constitution).) Second, Count III (there is no Count II) is a negligence claim (*id.* ¶¶ 33-34) accompanied by a demand for judgment that makes no mention of negligence. (*Id.* at 9 (seeking damages under § 1983).) Third, the Rehabilitation Act is invoked in the Complaint’s jurisdictional paragraph (*id.* ¶ 1), but there are no allegations or demands relating thereto anywhere in the remainder of the Complaint. Finally, although Plaintiff claims to invoke the equal protection and equal rights clauses of the Pennsylvania Constitution (*id.*), the Complaint alleges only that Defendants violated Plaintiff’s “Pa [sic] Constitutional right to be free of cruel and unusual punishment.” (*Id.* ¶ 27; *see also id.* ¶ 28 (asserting state constitutional right to “vital medical knowledge”), ¶ 29 (alleging “cruel and unusual punishment in violation of the . . . PA Constitution”).)

to dismiss these claims pursuant to Rule 12(b)(6).³ For the reasons set out below, Defendants' motions are granted.

I. FACTUAL BACKGROUND

Plaintiff alleges that while she was incarcerated at BCCF, she regularly came into contact with an inmate who was infected with methicillin resistant staphylococcus ("MRSA"), but that the BCCF staff never informed Plaintiff of the other inmate's condition. (Compl. ¶ 12.) As a result, Plaintiff was infected with MRSA. (*See id.* ¶ 13.) BCCF staff refused to treat Plaintiff's condition on the grounds that such treatment would be too expensive, and they accused her of engaging in unprotected sexual activity with infected female inmates. (*Id.* ¶¶ 13-14.) When a physician requested permission to treat Plaintiff with intravenous medication, he was refused by Defendants Crowe and Morton, who also denied requests from Plaintiff's mother to pay for the treatment. (*Id.* ¶¶ 16, 18.) In August 2002, Plaintiff obtained a court order directing Defendants to permit her to see an infectious disease specialist. (*Id.* ¶ 19.) After seeing this specialist, Plaintiff was placed in a solitary confinement cell because BCCF had no medical housing. (*Id.* ¶ 20.) The cell was wet, moldy, and mildewed, all of which aggravated her condition. (*Id.*) She was given only a bottle of antibacterial soap and a bottle of bleach as cleaning supplies. (*Id.* ¶ 21.) As a result of this treatment, Plaintiff, who has since been

³ There are two pending motions to dismiss. The first was filed by: (a) the County; (b) Defendants Ehrlacher, Polk, Crowe, and Schellhorn in their individual capacities; and (c) Defendants Gubernick and Morton in their individual and official capacities. The second motion was filed by Defendants Ehrlacher, Polk, Crowe, and Schellhorn in their official capacities. Defendants do not seek dismissal of Plaintiff's Eighth Amendment and medical malpractice claims.

released from BCCF, suffered serious physical and mental harm, including a permanent hole in her septum. (*Id.* ¶ 17.)

II. STANDARD OF REVIEW

When deciding a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the court may look only to the facts alleged in the complaint and its attachments. *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1261 (3d Cir. 1994). The court must accept as true all of the factual allegations pleaded in the complaint and draw all reasonable inferences in favor of the non-moving party. *Bd. of Trs. of Bricklayers & Allied Craftsmen Local 6 of N.J. Welfare Fund v. Wettlin Assocs., Inc.*, 237 F.3d 270, 272 (3d Cir. 2001). A motion to dismiss will only be granted if it is clear that relief cannot be granted to the plaintiff under any set of facts that could be proven consistent with the complaint's allegations. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984) (*citing Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

III. DISCUSSION

Plaintiff does not contest the dismissal of her First Amendment and Rehabilitation Act claims. (Pl.'s Resp. to Defs.' Mot. to Dismiss at 1 (hereinafter "Pl.'s First Resp."); Pl.'s Resp. to Defs.' Ehrlicher, Polk, Crowe, and Schellhorn's Mot. to Dismiss at 1 n.1 (hereinafter "Pl.'s Second Resp.")) Thus, the only issue in dispute concerns Plaintiff's claims under the Pennsylvania Constitution.

Plaintiff asserts claims under two sections of the state constitution. First, she cites Article I, § 26, which is the state equivalent of the Equal Protection Clause of the Fourteenth Amendment to

the United States Constitution. *Love v. Borough of Stroudsburg*, 597 A.2d 1137, 1139 (Pa. 1991) (“The equal protection provisions of the Pennsylvania Constitution are analyzed . . . under the same standards used . . . when reviewing equal protection claims under the Fourteenth Amendment to the United States Constitution.”). Defendant argues, inter alia, that money damages are not available under § 26.

This issue is apparently one of first impression, and the Court therefore hesitates to interpret the state constitution if doing so may be avoided. Such interpretation is easily avoided in this case, for Plaintiff’s Complaint does not properly state a claim for violation of her equal protection rights. “In order to properly state an equal protection claim, a plaintiff must allege that he is receiving different treatment from that received by other similarly situated individuals.” *Myers v. Ridge*, 712 A.2d 791, 799 (Pa. Commw. Ct. 1998) (citing *Capital Cities Media, Inc. v. Chester*, 797 F.2d 1164 (3d Cir.1986)). Even when every allegation in the Complaint is accepted as true and all reasonable inferences drawn therefrom, Plaintiff has not alleged that she was treated differently than similarly-situated prisoners. In fact, she makes no allegations whatsoever regarding the treatment of other inmates. Therefore, Plaintiff has failed to meet even the minimal requirements of notice pleading, under which she must set out a “statement of the claim showing that [she] is entitled to relief.” FED. R. CIV. P. 8(a). Thus, the Court grants Defendants’ motion to dismiss Plaintiff’s § 26 claim pursuant to Rule 12(b)(6) without reaching the issue of whether monetary damages may be obtained under that section.⁴

⁴ The Court notes that if it were to reach this question, the result would almost certainly be in Defendants’ favor, for it is indisputable that the Fourteenth Amendment, which provides the analytical framework for § 26 actions, does not provide a right to money damages. See 42 U.S.C. § 1983 (providing right to money damages for Constitutional violations); see also *Chantilly Farms, Inc. v. W. Pikeland Township*, Civ. No. 00-3903, 2001 WL 290645, at *11-12, 2001 U.S.

Regarding § 28, which prohibits gender-based discrimination, both parties note that there is substantial disagreement regarding whether this section permits a private right of action. The Third Circuit has stated, in dicta, that there is a private right of action under § 28. *Pfeifer v. Marion Ctr. Area Sch. Dist.*, 917 F.2d 779, 789 (3d Cir.1990). Nonetheless, the district courts in Pennsylvania are split on this issue. Compare *Barrett v. Greater Hatboro Chamber of Commerce, Inc.*, Civ. No. 02-4421, 2003 WL 22232869, at *4, 2003 U.S. Dist. LEXIS 15498, at *11-12 (E.D. Pa. Aug 19, 2003) (Tucker, J.) (finding private right of action), *Imboden v. Chowns Communications*, 182 F. Supp. 2d 453, 458 (E.D. Pa. 2002) (Kauffman, J.), and *Kemether v. Pa. Interscholastic Athletic Ass'n, Inc.*, 15 F. Supp. 2d 740, 755 (E.D. Pa. 1998) (Yohn, J.), with *E.E.O.C. v. Dan Lepore & Sons Co.*, Civ. No. 03-5462, 2004 WL 569526, at *2, 2004 U.S. Dist. LEXIS 4842, at *7-8 (E.D. Pa. Mar. 15, 2004) (Davis, J.) (finding no private right of action), *Ryan v. Gen. Mach. Prods.*, 277 F. Supp. 2d 585, 595, (E.D. Pa. 2003) (Baylson, J.), *Kelleher v. City of Reading*, Civ. No. 01-3386, 2001 WL 1132401, at *2-3, 2001 U.S. Dist. LEXIS 14958, at *9-10 (E.D. Pa. Sept. 24, 2001) (Padova, J.), *Dooley v. City of Philadelphia*, 153 F. Supp. 2d 628, 663 (E.D. Pa. 2001) (Reed, J.), *Lees v. W. Greene Sch. Dist.*, 632 F. Supp. 1327, 1335 (W.D. Pa. 1986), and *Pendrell v. Chatham Coll.*, 386 F. Supp. 341 (W.D. Pa. 1974). As noted above regarding § 26, however, where the state courts have not decided a state constitutional issue, this Court generally declines to address the issue, if possible. In this case, the constitutional issue need not be addressed because, as with § 26, Plaintiff's Complaint provides no basis on which Defendants could be found to have violated § 28,

Dist. LEXIS 3328, at *36 (E.D. Pa. Mar. 23, 2001) (noting that Pennsylvania has no equivalent to § 1983, but declining to address issue of whether § 26 provides right to money damages). Furthermore, the Court notes that Plaintiff's response brief, rather than addressing § 26, instead refers the Court to the 1903 version of that section, which is now § 25 and deals with reservation of powers, and § 16, which relates to insolvent debtors. (Pl's First Resp. at 2 (unpaginated).)

for there is no allegation of any kind that male and female inmates at BCCF were treated differently. Thus, the Court grants Defendants' motion to dismiss for failure to state a claim and declines to decide whether § 28 provides a private cause of action.⁵

IV. CONCLUSION

For the reasons state above, Defendants' motions to dismiss Plaintiff's Rehabilitation Act, First Amendment, and Pennsylvania Constitutional claims are granted. Thus, the only claims remaining are those brought under the Eighth Amendment and for medical malpractice. An appropriate Order follows.

⁵ The Court also does not reach the issue of statutory immunity, but notes that the "willful misconduct" exception of 42 PA. CONS. STAT. ANN. § 8550 would not apply to this case because Plaintiff's Complaint does not allege such misconduct. Rather, Plaintiff specifically alleges that Defendants "were *deliberately indifferent* to all Plaintiff's serious medical needs . . . [and] constitutionally protected rights." (Compl. ¶¶ 23-24 (emphasis added).) As another District Judge within this District has held, in a thorough analysis of Pennsylvania law, an allegation of deliberate indifference may be sufficient to make out a § 1983 claim, but it does not provide a basis for invoking the "willful misconduct" exception of § 8550. *Owens v. City of Philadelphia*, 6 F. Supp. 2d 373, 394-95 (E.D. Pa.1998) (holding that state actors were subject to § 1983 claim but immune from state-law claims where plaintiff showed only that defendants acted with deliberate indifference); *see also Smith v. County of Bucks*, Civ. No. 02-6238, 2004 WL 868278, *5 (E.D. Pa. Apr. 19, 2004) (same); *cf. DiSalvio v. Lower Merion High Sch. Dist.*, 158 F. Supp. 2d 553, 561-62 (E.D. Pa. 2001) (permitting plaintiff to pursue intentional infliction of emotional distress claim where she alleged defendant acted with specific intent to cause her harm). Thus, because Plaintiff alleges no more than deliberate indifference on the part of Defendants, § 8550 would not abrogate Defendants' immunity under 42 PA. CONS. STAT. ANN. §§ 8541, 8545.

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	:	

ORDER

AND NOW, this 26th day of **July, 2004**, upon consideration of Defendants' Motions for Summary Judgment (Document Nos. 4 & 6) and Plaintiff's responses thereto, it is hereby **ORDERED** that:

Defendants' Motions to Dismiss are **GRANTED**. Plaintiff's First Amendment, Rehabilitation Act, and state constitutional claims are **DISMISSED**.

BY THE COURT:

Berle M. Schiller, J.